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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1179

GEORGE RAMSEY, et al.,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

OPINIONS BELOW

Petitioners accurately note (Pet. 3) the Sixth Circuit's opinions are reported in 416 F.2d 655 and appear in Appendix A to the certiorari petition (the affirming opinion, *per* Circuit Judge Edwards, at pp. 31-55, while that *per* Circuit Judge O'Sullivan is at pp. 55-75).

The district court's opinion,[1] reported in 265 F. Supp. 388, appears in the Certified Record (61-167a).[2]

As the certiorari petition indicates (p. 3), the stipulated record includes, *inter alia*, the printed Appendix filed in the Sixth Circuit by petitioners (three volumes with page numbers followed by the letter "a") and the printed Appendix filed by United Mine Workers of America (three volumes with page numbers followed by the letter "b"), and the small printed volume entitled, "Supplementary Appendix for Plaintiffs-Appellants", pp. 1124-91a.

JURISDICTIONAL GROUNDS

Jurisdictional requisites are adequately set forth in the certiorari petition (p. 3).

STATUTES AND RULES INVOLVED

The statutory provisions involved are Sections 1 and 2, Sherman Antitrust Act (15 USCA 1, 2); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); and the Labor Management Relations Act, 1947 [29 USCA 141, 151, 157 and 158(b) and (e)]. Petitioners erroneously include (Pet. 5) the Employment Act [15 USCA 1021, 1022, 1024 (a), (b) and (c)], discussed, *post*, p. 24.[3]

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[1]The United States Court of Appeals for the Sixth Circuit is referred to herein as "Sixth Circuit".

The United States District Court for the Eastern District of Tennessee, Southern Division (at Chattanooga) is referred to as "district court".

[2]Since the certiorari petition herein fails to comply with this Court's Rule 23 (i), respondent UMW's references to the district court's opinion will be to the case as reported in 265 F.Supp. 388-439.

[3]These statutes are herein called *Sherman, Clayton, Norris-LaGuardia* and *Taft-Hartley*, respectively. Pertinent statutory provisions, as well as Rule 52(a), are found in Appendix A to this brief, pp. 1a-11a.

Also involved is Rule 52(a), Federal Rules of Civil Procedure.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

UMW does not accept the statement of Questions Presented as set forth in the petition (pp. 4-5). In lieu thereof, UMW submits the following:

1. Did the Sixth Circuit's affirming opinion and the district court properly hold that proof of a conspiracy between employers and labor, formed with the intention of driving competitors out of business, is essential to a finding that a labor union has violated the Sherman Antitrust Act and that the anticompetitive conspiracy must be established by "clear proof" under Section 6 of the Norris-LaGuardia Act?

2. Did the Sixth Circuit's affirming opinion and the district court, under applicable law and the evidence, properly exonerate UMW of the conspiracy charged under Sections 1 and 2 of the Sherman Antitrust Act?

3. Was the Sixth Circuit's affirmance of the district court's dismissal of the antitrust claims proper under Rule 52(a), Federal Rules of Civil Procedure?

COUNTERSTATEMENT OF THE CASE

A. LEGAL PRINCIPLES INVOLVED.

In *UMW* v. *Pennington*, 381 U.S. 657, this Court delineated, in its majority opinion, guidelines for determining antitrust violations *involving labor unions*. It held it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the anti-trust laws and . . . may as a matter of its own policy, and not by agreement with

all or part of the employers of that unit, seek the same wages from other employers" and no case under *Sherman* "could be made out on evidence limited to such union behavior" (381 U.S. 665).[4] It avowed:

> "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union"

and, further,

> "The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy" (p. 665, fn. 2).

Underlying *Pennington's* premise is recognition that "a legitimate aim of any national labor organization is to obtain uniformity of labor standards" and, as *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 held, "a consequence of such union activity may be to eliminate competition based on differences in such standards" (381 U.S. 666).

Pennington recognized " . . . a union forfeits its exemption from the anti-trust laws when it is *clearly shown* that it has agreed with one set of employers to impose a certain wage scale on other bargaining units" (381 U.S. 665). Subsequent to *first Pennington*, 381 U.S. 657, this Court held in *UMW* v. *Gibbs*, 383 U.S. 715, that

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[4]The premise is emphasized by Mr. Justice White's further statement: ". . . a union may make wage agreements with a multi-employer bargaining unit and *may in pursuance of its own union interests* seek to obtain the same terms from other employers" (381 U.S. 665). [All emphases are supplied, unless otherwise indicated.]

Norris-LaGuardia's Section 6 conditions a union's responsibility in a federal court for unlawful acts of its officers, members or agents *only* upon *"clear proof"* of the union's actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof, *defined as "clear, unequivocal and convincing proof" and "more than a bare preponderance"* (p. 737).

Following both *first Pennington* and *Gibbs*, the Sixth Circuit appraised *first Pennington's* teachings to be (1) that a conspiracy between employers and labor formed with the intention of driving competitors out of business is a *Sherman* violation; (2) that "predatory intent" as used in *first Pennington* "is merely shorthand, employed to describe this anti-competitive conspiracy" and (3) that such an anti-competitive conspiracy must be established by "clear proof", directing attention to *Gibbs*, 383 U.S. 715 (*Lewis* v. *Pennington*, 6 Cir., 400 F.2d 806, 814).

B. THE KIND OF ACTION.

This action involved implementation of the foregoing guidelines relating to UMW's exemption as a labor union from *Sherman's* proscriptions.

Petitioners herein are 18[5] coal producers in southeastern Tennessee which sued the United Mine Workers of America (UMW), seeking damages for an alleged violation of Sherman's Sections 1 and 2.

UMW Theories

UMW's theories (66-69a) summarized are: UMW denied the conspiracy charges. It asserted UMW is a labor organization within *Clayton's* Section 6, that by

[5]17 of petitioners were plaintiffs-appellants in the Sixth Circuit's Case No. 17,878, and Tennessee Products & Chemical Corporation was plaintiff-appellant in the Sixth Circuit's Case No. 17,879.

virtue of *Clayton's* Sections 6 and 20 (15 USCA 17, 29 USCA 52) and the Norris-LaGuardia Act (29 USCA 101 *et seq.*), the negotiations and execution of agreements by UMW and its acts and conduct in connection with the enforcement thereof do not constitute a *Sherman* violation. It further asserted all agreements were obtained by its independent efforts, acting unilaterally and in its own self-interest, free of alliance or combination with any employer or groups of employers for a predatory, anticompetitive purpose and that its acts were motivated by legitimate labor goals to secure uniformity of labor standards of wages and working conditions for its members.

C. THE JUDGMENTS APPEALED.

The cases were heard by the district court sitting without a jury. The district court's March 4, 1967, opinion (61-167a) exonerated UMW of the alleged Sherman conspiracy; and its judgment orders of March 9, 1967, included the district court's opinion that petitioners "failed to establish their alleged causes of action against" UMW and dismissed with prejudice their actions (168-69a), from which petitioners appealed (172a).

The Sixth Circuit affirmed by an evenly divided Court (Pet. A. 32).

D. THE DISTRICT COURT EXONERATED UMW OF CONSPIRACY PRIOR TO THE 1958 AGREEMENT.

Noting UMW's consistent policy and goals since 1890 to establish uniformity of wages and labor standards,[6] its consistent opposition to wage-cutting to meet competition,[7] and the *uncontradicted* denials of the conspiracy

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[6]Page references supporting the district court findings are: 737-38a, 744a, 746-54a, 1332-1336b.

[7]Page references supporting the district court findings are 592-93a, 739-40a, 742a, 744a, 787-88a, 791a, 1324-26b, 1337b.

charge[6], the district court exonerated UMW from the conspiracy charge that the 1950 contract was conspiratorial, finding it was "negotiated under intense national interest, intense publicity, and intense supervision by and pressure from the Federal Government" (265 F. Supp. 406; 95a). It rejected petitioners' contention that peaceful bargaining in the post-1950 period evidenced a conspiracy and refused to read a *Sherman* conspiracy into the UMW-BCOA negotiations in negotiating and executing the 1951, 1952, 1955 and 1956 contracts, declaring (265 F.Supp. 408; 98a), "That these more peaceful procedures suggest a Sherman Act conspiracy . . . is not reasonably to be inferred", and "A contrasting peaceful and orderly pattern of collective bargaining following a prior pattern of industrial warfare and strife does not become suspect nor serve as an evidentiary predicate for a Sherman Act conspiracy charge."

The district court refused to infer a conspiracy on the basis of the wage scale negotiated in 1950, avowing to do so engages "in unwarranted speculation" and disregards UMW's undeniable right, consistent with *first Pennington* not to "gear its wage demands to wages which the weakest unit in the industry can afford to pay" (265 F.Supp. 407; 95-96a).

Of economic pressures resultant from wage increases and mechanization, the district court declared (265 F. Supp. 409; 101a), "economic pressures created by technological advances and the competition engendered thereby do not equate to a Sherman Act violation. Upon the contrary, the Sherman Act is designed to keep the market open so that such competitive pressures may operate."

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[6]Page references supporting the district court findings are: 294a, 511a, 585-86a, 637-38a, 644a, 667a, 714a, 825-26a and 922a.

The district court's analysis lead it to declare it unable "to infer" any *Sherman* conspiracy in the 1950-58 period (265 F.Supp. 410; 102a).

E. THE SIXTH CIRCUIT'S AFFIRMING OPINION, LIKE THE DISTRICT COURT, HELD THE 1958 AGREEMENT'S PROTECTIVE WAGE CLAUSE TO BE VALID AND DID NOT CONSTITUTE A SHERMAN ACT VIOLATION.

1. Facts Pertaining To PWC.

The Protective Wage Clause (PWC) [see Appendix C to certiorari petition, pp. 93-98] had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, that each agreement contain a clause to protect the contract and preserve the interests of the miners (935a). It read: *"operators agree that they will not let any operating mines subject to this agreement as a subterfuge"* to avoid the Agreement's provisions (936a). A 1943 labor agreement, negotiated by the Secretary of the Interior and known as the Ickes-Lewis Agreement, contained an identical clause (938a). Subsequent agreements negotiated annually from 1943 through 1951 carried the anti-lease clause (938-39a).

The clause was expanded in the 1952 amendment to the 1950 Agreement when signatory operators agreed that:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. *The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement"* (940a).

This same language was carried forward in the 1955, 1956 and 1958 Agreements (935-41a).

For six years following the 1952 Agreement's execution, UMW believed signatory operators were "chiseling" on the contract (941a).

During negotiations for the 1958 Agreement, UMW proposed, and BCOA *rejected*, a protective wage clause. A revised proposal on November 25, 1958, accompanied a letter setting forth the clause's purpose and the reasons therefor: ". . . it has become mandatory that the union find a way in which to protect its members employed in the . . . industry against the ever-encroaching evils and practices of subcontracting, the production and procurement of coal not mined in accordance with the wage scales and other terms and conditions of the national agreement, and other companion evils flowing therefrom" (943a). Continuing, the letter recited: "Subcontracting by signatory operators is nothing more than pure evasion of their contractual obligation to pay and maintain the agreed standards of wages and . . . vitally affects our members because it progressively undermines our members' tenure of employment and results in removing and withdrawing from them more and more work and hence more and more jobs are lost to them" (943a). The letter charged, "many signatories of the present national agreement, indeed members of your own association, have been, and presently are, guilty of such nefarious practices", thereby becoming assisting parties "to those who seek to debase and lower our standard of wages, hours, safety requirements, work opportunities and other benefits" which UMW members are entitled to have protected (943a).

Agreement reached on PWC required coal mined, produced, prepared, procured or acquired by signatory operators shall be mined under labor standards as favorable to employees as those in UMW's contract (944a). UMW's John L. Lewis announced that labor standards and job opportunities to which UMW members are contractually entitled have been achieved after long years, and UMW seeks to safeguard these by PWC (945a). Reluctantly, BCOA agreed, to avoid an interruption in the supply of coal (947a).

Operators complained UMW was not enforcing contracts already signed among particular signatories, causing them to ask UMW for a reciprocal contractual commitment, and UMW's senior counsel testified that UMW acquiesced it would enforce the Agreement *as to all signatories thereto equally* (1029a).

There are *undisputed* positive denials that UMW entered into any agreement other than the collective bargaining agreement (824a, 1029a). *Uncontradicted* evidence of UMW witnesses show UMW free to negotiate a labor agreement at variance with the National Agreement (508a, 636-37a, 1034a). Consistent testimony of George H. Love for management (825a), denied there was any agreement on UMW's part to impose the negotiated agreement upon any other group of employers.

2. Prior to the Instant Action, the Sixth Circuit Held PWC Valid.

In *second Pennington* [*Lewis* v. *Pennington*, (6 Cir., 400 F.2d 806, 814, decided September, 1968)—a year prior to *Ramsey* (416 F.2d 655)], the Sixth Circuit agreed with the district court (257 F.Supp. 815, 862) that the disputed PWC, properly construed did not re-

quire UMW to impose the wages therein contained on nonsignatory employers; and it approved the legal principle that "Where two reasonable constructions of a written contract can be made, preference is given to that construction . . . that does not result in a violation of law", citing *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691, and *Perry Coal Co.* v. *NLRB*, 7 Cir., 284 F.2d 910, 914. Additionally, the Sixth Circuit observed, "even without the operation of this principle of law we would incline to the conclusion that the agreement did not constitute a violation of the *Sherman* Act, the record containing *insufficient evidence* from which a conspiracy or other violation could be found to have been clearly shown" (400 F.2d 815).

3. Consistent With Second Pennington, the District Court Held PWC Valid Under Sherman.

Though the district court's *Ramsey* preceded the Sixth Circuit's *second Pennington*, its *Ramsey* opinion applied the legal principle above noted and declared that PWC *did not constitute an express commitment by UMW to BCOA "not to bargain with any other coal operator" upon terms other than the* National Contract (265 F.Supp. 412). It then posed the quaere whether UMW "did in fact, though not expressly, so contract with" BCOA (p. 412). Implementing the standard of proof required by *Norris-LaGuardia's* Section 6 (29 USCA 106), the district court found *the record "does not establish such clear and unequivocal proof as to warrant the Court in finding" UMW "pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy on its own"* (265 F.Supp. 412). Further, it declared, *"The only direct evidence in the record is to*

the effect that the Union pursued such policy upon its own, and not in agreement with any employer" (p. 412).

Of PWC's Paragraph B., the district court said it "has to do with the obligation of the operators in regard to subcontracting and leasing", while PWC's subsequent paragraphs "have to do with the functioning of a joint industry contract committee in disposing of reported cases of violation" of PWC (p. 410).

PWC was not to become effective until April, 1959. It was never enforced (881a). Originally delayed by mechanics of setting up the Joint Industry Contract Committee (JICC), created by PWC, its activities were suspended on November 4, 1959 because of doubt concerning its legality under the Landrum-Griffin Act which barred "hot cargo" clauses (947-48a). PWC was specifically eliminated from the 1964 Agreement dated March 23, 1964 (477a, 493a, 1030a). JICC was dissolved March 31, 1964 (884a).[9]

4. The Sixth Circuit's Affirming Opinion, Consistent With Second Pennington, Held PWC Valid.

As elsewhere noted (*ante*, p. 6), an evenly divided Sixth Circuit affirmed the district court's holding as to PWC. Circuit Judge Edwards, with whom Chief Judge Phillips and Circuit Judges Peck and Combs concurred (Pet. A. 32), refused to find in PWC's language UMW's express undertaking to impose the BCOA-UMW wage

[9]The district court noted (265 F.Supp. 410, fn. 2) PWC's history subsequent to 1958 and deemed it immaterial to the present issue. Under *Lewis* v. *NLRB*, D. C. Cir., 350 F.2d 801, and *Boyle, et al.*, 179 NLRB No. 80, 72 LRRM 1426, decided November 4, 1969 (NLRB Chairman McCullough dissenting), sanctioned PWC's Paragraph B. as a *labor standards clause*, permissive under Section 8(e), Labor Management Relations Act, 1947, as amended [29 USCA 158 (e)]. NLRB's holding is crucial in light of *first Pennington's* recognition of national labor policy as reflected by NLRB decisions (381 U.S. 666-68).

Lewis v. *NLRB* and *Boyle, et al.* challenge petitioners' characterization of PWC's Paragraph B. as a "boycott of coal of non-complying producers" (Pet. 11).

scale on all non-signatory coal operators "to force some (including plaintiffs) out of business", declaring the disputed language indicates "it is expressly limited in its effect to its signatories" (Pet. A. 37), finding "the language of the agreement did not per se constitute an illegal conspiracy" (Pet. A. 44).

Likewise, rejection of petitioners' contention of an implied agreement is found in the affirming opinion's adherence (Pet. A. 46) to *second Pennington* (400 F.2d 815), which held PWC valid (*ante*, pp. 12-13), in the district court's conclusion that the standard of proof where a labor union is involved is "clear proof" as required by *Norris-LaGuardia's* Section 6 (Pet. A. 39-40), in the affirming opinion's recognition that "reconciliation of national labor policy with national antitrust policy demands application of" such standard (Pet. A. 45), in its rejection of petitioners' claim concerning events in the southeastern Tennessee coal fields and UMW's investments in West Kentucky (discussed, *post*, pp. 13-14), and in the Sixth Circuit's holding that ample evidence supported district court findings (Pet. A. 55). As the affirming opinion aptly recites (Pet. A. 45), since labor unions seek "agreements with employers on wages, hours and working conditions", and each has a separate motive "for extending such agreement to other employers in the same field, it would be simple to defeat the national policy of encouraging collective bargaining by allowing easy implication of union-employer antitrust conspiracies".

F. THE SIXTH CIRCUIT'S AFFIRMING OPINION, LIKE THE DISTRICT COURT, REJECTED EVIDENCE OF EVENTS IN SOUTHEASTERN TENNESSEE COAL FIELDS AND PRICING OF COAL UPON THE TVA MARKET AS PROVING A SHERMAN CONSPIRACY.

District court findings pertaining to UMW organizing activities and other events in southeastern Tennessee

coal fields appear in its opinion in 265 F.Supp. 424-31, while UMW investments in West Kentucky Coal Company are detailed in 265 F.Supp. 412, the TVA market at p. 415 and coal pricing on that market by West Kentucky at pp. 416-23 and, in part, in the certiorari petition, pp. A.48-55.

The Sixth Circuit's affirming opinion, like district court holdings, found in essence (Pet. A. 47-55): (1) in organizing activities in south-eastern Tennessee coal fields UMW pursued its own and its members' interests rather than those of BCOA: (2) petitioners' economic troubles stemmed from geological structures of the coal fields making mechanization of mines to meet competitive fuels' competition difficult, and from under capitalization and bad management; and (3) the total record did not support the charge UMW conspired with West Kentucky Coal Company so as to engage in predatory price cutting on the TVA market, prices being based upon legitimate business considerations to meet competition, rather than lead the market downward (265 F.Supp. 422).[10]

Petitioners' references (Pet. 12, 17, 21) to strike activity, obviously intended to indicate illegal conduct, are answered by *Hunt* v. *Crumboch* (325 U. S. 821, 824), declaring, "It is not a violation of" *Sherman* "for laborers in combination to refuse to work" and "They can sell or not sell their labors as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws". *Accord: Apex* (310 U.S. 503).

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[10]That UMW made no suggestions or proposed policies with reference to West Kentucky's and/or Nashville Coal Company's management or pricing policies appears in uncontradicted evidence of 10 witnesses: 271b, 386-87a, 705b, 711b, 712-13b, 770b, 824-25a, 852b, 857b, 921-22a, 1010-11b, 1034-35b, 1047b.

Consistent with *Apex* (310 U.S. 513) that "Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because. . . they are attended by violence", the district court declared (265 F. Supp. 430), "picketing and violence are not per se evidence" of a *Sherman* conspiracy. Further, petitioners' references (Pet. 17) to violence ignore the district court's statements (265 F.Supp. 429) that both UMW, as well as petitioners, were victims of violence, noting a district representative's home "was damaged by dynamite", "local union halls were burned" and 'Union men were shot at and union homes were burned". The irrelevancy of violence appears in the district court's finding that "in not a single instance was an act of violence traced to an identifiable assailant" and UMW "could not be held chargeable for the violence, even were the standard of proof required that of the usual civil case" (265 F.Supp. 429). Of evidence pertaining to picketing and violence, the district court found, "The record in this regard fails to show any direct evidence of a Sherman Act conspiracy" (265 F.Supp. 430; Pet. A. 48).

The district court, *reviewing the evidence as a whole*, was unable to find the evidence clearly reflected petitioners were victims of conspiracy between UMW and any non-labor organization to eliminate or suppress competition in the coal industry, or to eliminate or suppress petitioners' coal production. The district court declared, "While many inferences favorable to [petitioners'] contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary" and *the latter, coupled with positive denial* by many witnesses of any conspiracy, "as well as other inferences favorable only to the defendant's

contentions, do not permit a finding based upon clear proof of an antitrust conspiracy" (265 F.Supp. 432).

Consistent with its *second Pennington* appraisal, and that of other courts,[11] of the teachings of *first Pennington* (*ante*, pp. 3-5), the Sixth Circuit's affirming opinion held that *Pennington* required a finding of "predatory intent" (Pet. A. 46).

The affirming opinion also declared, "There is ample evidence in this record to support these findings; and we certainly cannot hold them to be 'clearly erroneous'", citing Rule 52(a), Federal Rules of Civil Procedure (Pet. A. 55).

G. THE SIXTH CIRCUIT DIVIDED EVENLY ON THE ISSUE OF THE PROPER STANDARD OF PROOF.

The certiorari petition accurately states (Pet. 18) that originally a panel of three judges reversed the district court on the ground that a preponderance of evidence sufficed to support the conspiracy charge; a UMW petition to rehear en banc occasioned the Sixth Circuit to divide equally and to affirm the district court's *Ramsey* (416 F.2d 655). The issue over which the court divided was whether *Norris-LaGuardia's* Section 6 requires all elements of a cause of action for antitrust violation to be proved by "clear proof" where a labor union is defendant, as held in the Edwards opinion, or whether the statute's standard is limited "to the determination of the

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[11]See the Seventh Circuit's *Associated Milk Dealers, Inc.* v. *Milk Drivers Union, Teamsters*, decided February 6, 1970, 73 LRRM 2435, 2440, holding that "a majority of the Supreme Court in Pennington requires proof of predatory purpose as a prerequisite to finding that a most favored nation clause violates the antitrust laws" and *National Dairy Products Corp.* v. *Milk Drivers, etc. Union*, USDC, S.D. N.Y., decided February 4, 1970, 73 LRRM 2444, 2447, noting "There is here no anti-competitive purpose of the type that Sherman Act condemns".

authority of 'individual officers, members, or agents' to act for a labor union or other organization", as the O'Sullivan opinion contended (Pet. A. 55-56).

In addition to its affirmance of the district court's findings (*ante*, pp. 8-16), the affirming opinion declined "the invitation to write an advisory opinion" on the question, "Does the Sherman Act place any restraints on national collective bargaining?" (Pet. A. 34); while the O'Sullivan opinion would reverse (Pet. A. 60) and vacate the district court's judgment and "remand the cause for further proceedings consistent herewith" (Pet. A. 75), noting the opinion did "not reach consideration of whether the District Judge's findings were 'clearly erroneous' " (Pet. A. 61).

ARGUMENT

A. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

1. The Sixth Circuit's Affirming Opinion Correctly Holds That Section 6 Of The Norris-LaGuardia Act Is The Proper Standard Of Proof Applicable To A Sherman Act Suit Against A Labor Union.

a. This Court denied certiorari in *second Pennington*, which had adopted *Norris-LaGuardia's* "clear proof" rule as the proper standard of proof in a Sherman Act suit involving a labor union.

The Sixth Circuit's *second Pennington* (400 F.2d 814) held that an anticompetitive conspiracy where a labor union is involved must be established by "clear proof", citing *Gibbs* (383 U.S. 715) and, following the Sixth Circuit's adoption of its "clear proof" rule, this Court denied certiorari in *second Pennington* (393 U.S. 983), one question submitted being the applicability of the

"clear proof" rule under *Norris-LaGuardia's* Section 6.[12] *The O'Sullivan opinion ignores this fact.*

Recognizing that denial of certiorari does not represent affirmance, the affirming opinion states, "we consider it inappropriate to discount completely the denial of certiorari in second *Pennington*" and observing the award of certiorari in *first Pennington* with instructions for retrial, the affirming opinion continued, "If the trial court, or this court, had interpreted those instructions erroneously in the course of retrial or appeal, we find it difficult to believe that the Supreme Court would have ignored the error" (Pet. A. 43).

b. Section 6's legislative history makes clear its applicability where labor unions are involved.

The Sixth Circuit's affirming opinion's adoption of *Norris-LaGuardia's* "clear proof" rule as the proper standard of proof is supported by Senate Report No. 163, 72d Congress, 1st Session, p. 19, to which the affirming opinion refers (Pet. A. 45), which, under the heading, *"Responsibility for Unlawful Acts"*, recites, in part:

> "To hold that officers or members of a labor organization, *or the organization itself*, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, participation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor.
>
> "Moreover, . . this section, as do most all of the other prohibitive sections of the bill, *applies* both

[12] In *second Pennington's* certiorari petition (Case No. 558, October Term, 1968), Question 4 read thus:

"Is a Sherman Act case, based on a national contracting combination of union and business groups, to fail because of the proof of specific intent being held insufficient to satisfy Norris-LaGuardia's 'clear proof' rule when there can be no question of authorization, ratification and participation in the industry-wide bargaining?"

to organizations of labor and organizations of capital. *The same rule throughout the bill, wherever it is applicable, applies* both to employers and employees, and also *to organizations* of employers and *employees.*

". . But *no* person or *organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it.*

* * * * *

"Opposition to this section has been voiced on the ground that it seeks to establish a 'new law of agency.' In the first place, *this section is concerned especially with establishing a rule of evidence.*"

The O'Sullivan opinion read Section 6's "black letter title", reading, "Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents", as clearly exposing the Section's limitations and declared *Carpenters v. U.S.*, 330 U.S. 395, clearly limits the "clear proof" rule to the matter of proving the authority of an alleged agent (Pet. A. 58).[13]

c. The Sixth Circuit's affirming opinion accords with prior cases of this Court.

The Sixth Circuit's affirming opinion comports with *first Pennington's* mandate (381 U.S. 665) that *Sherman's* scope be accommodative to the policy of labor laws by "harmonizing the Sherman Act with national policy expressed in the National Labor Relations Act", and with the requirement of *U. S. v. Hutcheson* (312 U.S. 219, 232) that the Sherman, Clayton and Norris-LaGuardia Acts be treated as "interlacing statutes".

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[13]The O'Sullivan opinion persists in the same error in appraising the district court's "clear proof" instruction in *first Pennington* (Pet. A. 64-65 and fns. 4 and 5).

Carpenters v. *U.S.* (330 U.S. 395), *an antitrust case*, expressly held *Norris-LaGuardia's* Section 6 applicable in a *Sherman* case, thus discrediting the O'Sullivan opinion's statements (Pet. 24) the affirming opinion announces *"a new rule giving labor unions special treatment in defending suits under" Sherman* and does violence to Section 6's plain language *"by reading into it new and special antitrust insulation of labor unions not contained in the exemption granted them by the Clayton Act"*. Indeed, *Carpenters* announced on the issue of conspiracy that *"the power of the trial court is limited by §6 of the Norris-LaGuardia Act"* (330 U.S. 401), *"Congress in §6 has specified the standards by which the liability of employee . . groups is to be determined"* (p. 410), and Section 6's "purpose and effect was to relieve *organizations*, whether of *labor* or capital," from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, *"except"*, as Section 6 states, "upon clear proof" of the union's *"actual participation in, or actual authorization of"* unlawful acts *"or of ratification of such acts after actual knowledge thereof"* (330 U.S. 403).

While the O'Sullivan opinion correctly avers (Pet. A. 57) *Gibbs* was not an antitrust action, *Gibbs* noted counsel therein, as did petitioners herein, argued the case *"was a conspiracy to impose the UMW and the UMW's standard contract on the coal fields of Tennessee"* (383 U.S. 733, fn. 20), and it was the *union* (UMW) whose responsibility was submitted to the jury; and, though observing Section 6 does not define "clear proof", *Gibbs* meaningfully declared the Section's "history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar

phrases as *'clear, unequivocal, and convincing proof'* " (383 U.S. 737).

While, as the O'Sullivan opinion points out (Pet. A. 57), *Carpenters* involved criminal proceedings, this does not detract from its *primary holding that Norris-LaGuardia's Section 6 is binding "upon all courts of the United States in all matters growing out of labor disputes covered by the Act"* (330 U.S. 401).

The O'Sullivan opinion (Pet. A. 57) quotes from *Ramsey's* district court opinion (265 F.Supp. 412) that "Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the U.M.W. did so impliedly agree", but the district court failed to state upon what facts it premised its conclusion; it did not hold this would constitute a *Sherman* violation; and its statement is inconsistent with the court's findings that *"The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer"* (265 F.Supp. 412) and *"All of the direct evidence in the record expressly denies the plaintiffs' contentions of a conspiracy"*, and that "Every officer of the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence" (p. 432). Indeed, petitioners themselves inquire, "What part of the record or evidence was it that made . . the trial judge, find that the preponderance of the evidence proved a strait-jacket agreement by UMW?" (Pet. 21).

The Sixth Circuit's *first Pennington* (325 F.2d 804) did not reject UMW's contention that Section 6 should apply.[14] Whereas the O'Sullivan opinion (Pet. A. 63)

[14]Neither Judges Weick nor O'Sullivan participated in that opinion. Circuit Judges Celebrezze and McCree were not at the time members of the Sixth Circuit.

considers the Supreme Court's *first Pennington* would permit a jury to find UMW guilty of a *Sherman* violation, actually the Supreme Court expressly observed (381 U.S. 665, fn. 2) that "we indicate no opinion as to" the evidence's sufficiency. Justice White's repetitive references (381 U.S. 662, 663, 665) to *Carpenters* would render it unrealistic to disassociate his "clearly shown" phrase from *Carpenters'* requirement of Section 6's applicability.

The foregoing discussion establishes the validity of the affirming opinion on the proper standard of proof, as well as the fallacies of the O'Sullivan opinion and petitioners' assertion that the "clear proof" standard is but a rule of proof of agency (Pet. 26).

2. Both Congress and This Court Have Rejected Petitioners' Contentions Concerning Industry-Wide Bargaining and National Labor Agreements.

Petitioners' complaints concerning industry-wide bargaining and national labor agreements have been rejected by Congress and this Court alike (Pet. 4-5, 8, 20, 26-27).

Legislative debates in connection with Congress' enactment of the Labor Management Relations Act, 1947, demonstrate Congress' refusal to interfere with industry-wide and multi-employer bargaining.[15] Indeed, *NLRB* v. *Truck Drivers Union*, 353 U.S. 87, 95, judicially records such refusal, noting that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer

[15]Legislative History of the Labor Management Relations Act, 1947 (U.S. Government Printing Office, 1948), Vol. I, pp. 326, 457, 584, 636, 643, 673, 715, 758, 760, 764-65; Vol. II, pp. 970, 1037, 1038, 1059, 1271-73, 1299, 1301-02.

Parks v. *IBEW*, 4 Cir., 314 F.2d 886, states (pp. 906-07), "A strong provision prohibiting industry-wide bargaining was passed in the House" but eliminated from the Senate Bill; and attempts to reinstate the House provisions were defeated.

associations." Congressional debates are clear its refusal related to industry-wide bargaining.

Again, in 1959, legislative debates in connection with the Labor-Management Reporting and Disclosure Act of 1959 reflect Congressional determination not to interfere with industry-wide collective bargaining, by refusing to adopt proposals that the immunity accorded labor unions be excised from antitrust laws. Precisely the same arguments now directed by petitioners are found in the legislative debates. However, there was opposition to such legislation, and Congress rejected the anti-labor proposals.[16] Thus, petitioners' request that this Court condemn industry-wide agreements is to ask this Court to approve by judicial fiat what Congress refused to enact into legislation. Judicial acquiescence in such request is interdicted by *Colgate-Palmolive-Peet Co.* v. NLRB, 338 U.S. 355, 363-64, where it is said that, "The emasculation of the contract pressed for by the Board in order to achieve that which Congress refused to enact into law cannot be sustained."

Petitioners' real complaint concerning UMW's National Agreement is that UMW should have abandoned its historic policy of uniformity, resorted to regional bargaining and acceded to petitioners' demand they be subsidized at the expense of coal miner members of UMW, and thus afford coal producers in Tennessee a competitive advantage over their competitors—a complaint which *first Pennington* rejected: "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect

[16]Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Government Printing Office, 1959), Vol. II, pp. 1941-42, 1690, 1508, 1717, 1747, 1837, 1189-90, 1320, 1809. See Appendix B, pp. 12a-16a, for excerpts from the legislative debates.

that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union" and "The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay" (381 U.S. 665, fn. 2).

First Pennington acknowledged the current efficacy of labor's exemption from the antitrust laws. Petitioners' proposal (Pet. 28-29) that this Court reach a result in light of reports before Congress, invites the admonition in *United Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 153, that these "are decisions which we believe suited to the legislative and not the judicial branch." Previous refusals on Congress' part to affect the current immunity of labor unions from the antitrust laws renders the *Bouligny* language particularly apt and petitioners' suggestion of significance of "National Policy of Employment" (15 USCA 1021 *et seq.*) abortive.

Second Pennington's certiorari petition posed identical complaints concerning industry-wide bargaining and national labor contracts. Pertinently, this Court rejected (393 U.S. 983) the assertions that they were tainted under *Sherman.*[17]

3. Effects and Consequences May Not Be Substituted For A Conspiracy Under The Sherman Act.

Petitioners emphasize their reliance on *proofs of effects and consequences of National Agreements,* pointing to unemployment resulting from intensive mechanization, the inability of operators in poor geographical conditions to compete and survive in the TVA coal market under the National Agreements and the losses of coal producers in the 1949-59 decade as compared

[17]See questions posed in *second Pennington's* certiorari petition, Nos. 2, 4 and 5 (*ante*, pp. 17-18, fn. 12 and *post*, pp. 25, 30).

with net profits of two of the largest coal producers (Pet. 15-16, 27-28) *as proving a Sherman violation.* These same indicia were rejected in *second Pennington* as a basis for a writ of certiorari (393 U. S. 983).[15] *Second Pennington's* Question 5 read, in part, "Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects. . . .?"

It is evident that the crux of petitioners' complaint is refusal of both the district court and the Sixth Circuit's affirming opinion to accept petitioners' position that *effects and consequences* of the National Agreement, to which multi-employers became signatories, may be *substituted* for conspiracy as the essential ingredient of a *Sherman* violation (Pet. 15-18), a view UMW asserts is opposed by *first Pennington.* Such substitution would completely strip of meaning Justice White's avowals that unilaterally a union may adopt a uniform wage policy and seek vigorously to implement it and the union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Petitioners'

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[15]In the certiorari petition in *second Pennington* (Case No. 558, October Term, 1968 in this Court), Question 5 read thus:

"Was the District Court (sustained by the Court of Appeals) right in holding that effects of industry-wide bargaining are alone insufficient, and were both lower courts right in not considering anywhere in their findings and conclusions such effects—the growing prosperity of the two largest companies and the deficit position of all the rest of the industry combined the inevitable and accelerating merger and concentration trend, the blight created in broad areas where conditions make the contract impossible, the loss of jobs of two-thirds of union members from automation made necessary by national contracts with nothing in the contracts to relieve the unemployed, the intensive and often violent efforts of the union to destroy the businesses of nonconforming operators, the waste of vital natural resources in abandonment of all but those areas of mines which can be stripped off the easiest or worked underground with large machines?"

premise would render meaningless Justice White's further unequivocal statements that "Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act", "There must be additional direct or indirect evidence of the *conspiracy*" and that a union's forfeiture of its exemption occurs only "when it is clearly shown that it has *agreed* with one set of employers to impose a certain wage scale on other bargaining units" (381 U.S. 665).

Since UMW can implement its wage policy only by collective bargaining and ultimately by agreement with multiple signatory operators, all permissive under national labor policy as willed by Congress and judicially sanctioned in *first Pennington*, to adjudge its conduct as illegal in light of effects and consequences is to render a union's immunity from *Sherman* as illusory. Clearly, no inference of conspiratorial conduct may be derived from activities permitted by national labor policy. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (312 U.S. 219, 232) forbids a finding of conspiracy from permissible conduct. Indeed, *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806, proclaims that conduct permitted by federal statutes "is not to be declared a violation of Federal law". Accord: *The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.*, 362 U.S. 330, 339-40. Otherwise, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of a uniform wage policy in the interest of its members.

Post-*first Pennington* interpretations, involving labor's exemption, consistently proclaim the necessity of proof

of predatory intent and anti-competitive purposes,[19] militate against petitioners' persistent claim that effects and consequences suffice to prove a *Sherman* conspiracy. Contrary to petitioners (Pet. 15), the cases cited are consonant with Justice Douglas' concurrence in *Pennington* (381 U.S. 672-73) which contained two factors, namely, (1) industry-wide agreement whereby employers and the union agreed on a wage scale exceeding the financial ability of some operators to pay, and (2) *it was made to force some employers out of business.*

4. The Sixth Circuit's Affirming Opinion and the District Court, Applying This Court's Guidelines in *First Pennington*, Properly Exonerated UMW of the Alleged Conspiracy.

a. The affirming opinion correctly determined that an anticompetitive conspiracy is essential to a *Sherman* violation.

Petitioners contended in the Sixth Circuit, as a concomitant that effects and consequences suffice to support a *Sherman* violation, that intent or predatory purpose has no place in the antitrust structure and is "important, not as an essential ingredient of the offense, but as bearing upon the probabilities of an illegal restraint taking effect."[20] The Sixth Circuit's affirming opinion rejected petitioners' contention and reaffirmed its interpretation that this Court's *first Pennington* teachings included "a conspiracy between employers and labor formed with the intention of driving competitors out of business" violated *Sherman*, and that Justice White's use of "pred-

[19] *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 106; *second Pennington*, 6 Cir., 400 F. 2d 814; *Cedar Crest Hats, Inc.* v. *United Hatters, Etc. Union*, 5 Cir. 362 F. 2d 322; *Associated Milk Dealers, Inc.* v. *Milk Drivers Union, Teamsters*, and *National Dairy Products Corp.* v. *Milk Drivers, etc. Union*, both ante, p. 16; *Republic Productions, Inc.* v. *American Federation of Musicians*, DC, S.D. N.Y., 1965, 245 F. Supp. 475.

[20] See petitioners' brief in the Sixth Circuit (Case No. 17,878), p. 50.

atory intent" (381 U.S. 668) "is merely shorthand, employed to describe this anticompetitive conspiracy" (Pet. A. 40-43, 46). This same issue, posed by losing companies in *second Pennington*, did not achieve this Court's award of certiorari.[21]

First Pennington (381 U.S. 664) continued to recognize, as *Apex* (310 U.S. 469) enunciated, that restraints on sale of employees' services are not commercial restraints outlawed by *Sherman* (pp. 502-03), a result stemming from Congressional immunity accorded labor unions under the Clayton Act's Section 6 (15 USCA 17) which avows that "The labor of a human being is not a commodity or article of commerce", that antitrust laws do not "forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof" and that labor unions are not to be "construed to be illegal combinations or conspiracies in restraint of trade" and, as *first Pennington* states (p. 661), from *Clayton's* Section 20 and *Norris-LaGuardia's* Section 4.

Justice White's majority opinion itself refers to the necessity of proof of predatory intent or anticompetitive agreement. In denouncing employer-union conduct designed to eliminate a favored employer's competitive interest, as distinguished from an interest in regulating labor relations, Justice White noted, "The *anticompetitive potential* of such a combination is obvious, but is

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[21] In *second Pennington's* certiorari petition (Case No. 558, October Term, 1968), Question 3 read thus:

> "Is a Sherman Act case to fail because of insufficient proof of the specific intent "to drive small competitors out of business" when it is undisputed that there was the intent to impose terms set by the conspirators on competitors, which terms were manifestly unjustified, unreasonable and concededly impossible to observe for over half the industry?"

little more severe than what is *alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry*" (381 U.S. 668). Further, while Justice White made clear his opinion did not relate to the evidence's sufficiency (381 U.S. 665, fn. 2), but dealt only with the complaint's allegations, in sanctioning the denial of UMW's dismissal motion, Justice White noted the *allegation* was the union became a party to *a collusive bidding arrangement designed to drive operators from TVA's spot market* (381 U.S. 663). It is to this collusive, anticompetitive type of agreement that Justice White alludes in his statement that "*all such agreements* between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case" (381 U.S. 668). It is thus evident that Justice White's reference to "*such agreements*" embodies the concept of a collusive, anticompetitive agreement involvement which, if clearly proved—and only in such an event—would effect a forfeiture of a union's exemption from the antitrust laws, as *first Pennington* recited (381 U.S. 665).

b. The Sixth Circuit's affirming opinion, like the district court, properly rejected petitioners' contentions that PWC violated *Sherman*.

UMW's struggle to protect the work opportunities and labor standards achieved through processes of collective bargaining are detailed (*ante*, pp. 8-10). Both opinions reject petitioners' argument that UMW obligated itself to BCOA to impose and enforce the National Agreement industry-wide (*ante*, pp. 11-13). There is no

evidentiary support for petitioners' assertion the district court "went along with UMW's contention, that once a bargaining unit agreed to the national contract it was fair and legal for the major companies to insist that the union keep that unit under the national contract and not modify the terms when it later sought to get out from under it so that unit could continue to compete" (Pet. 12).

As elsewhere shown (*ante*, pp. 11-12), PWC's language *did not constitute an express commitment by UMW to BCOA "not to bargain with any coal operator" upon terms other than the National Agreement* and *"The only direct evidence in the record is to the effect that the Union pursued" its "policy upon its own, and not in agreement with any employer"*. Uncontradicted denials that UMW entered into any agreement other than the bargaining agreement and undisputed evidence that UMW is free to negotiate a labor agreement at variance with the National Agreement, which the district court credited (265 F.Supp. 432), challenge petitioners' assertions.

PWC's sanction by the Sixth Circuit's affirming opinion, it has been shown (*ante*, pp. 10-11, 12-13), accorded with the Sixth Circuit's *second Pennington* which adopted the legal principle that "Where two reasonable constructions of a written contract can be made, preference is given to that construction . . . that does not result in a violation of law", and the record contained *"insufficient evidence from which a conspiracy or other violation could be found to have been clearly shown"* (400 F.2d 815).

Again, this same issue was posed in *second Pennington's* certiorari petition,[22] which this Court rejected (393 U.S. 983).

In light of undisputed evidence herein discussed (*ante*, pp. 8-10) and the total absence of any contradictory evidence in the certiorari petition, it is settled law, *applicable in antitrust cases*, that insofar as a conclusion is based on inferences drawn from documents or undisputed facts, Rule 52(a), Federal Rules of Civil Procedure, is applicable and such findings of fact are not to be set aside unless clearly erroneous. *U.S.* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394.

When it is recalled the affirmance concurred with district court's findings and conclusions regarding PWC's validity, as stated in *U.S.* v. *Johnson*, 319 U.S. 503, 518, it should "take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents".

UMW has responded to petitioners' complaints of industry-wide and national contracts (*ante*, pp. 22-24) and violence (*ante*, pp. 14-15). Their challenge of UMW's good faith bargaining in failing to modify the National Agreement (Pet. 17, 28) finds a ready answer in the Sixth

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[22]In *second Pennington's* certiorari petition (Case No. 558, October Term, 1968), Question 2 read thus:

"Did the union by the clear terms of the 'Protective Wage Clause' of the 1958 amendment to the National Bituminous Coal Wage Agreement, only a small part of which was before this Court on the first appeal, submit to such restraints upon its bargaining freedom in the various units of the industry as to violate the Sherman Act, those restraints having been demanded by the major companies with whom the union made the national contracts, and the union, the officers and representatives of all union branches, and smaller companies, being subject to trial by industry tribunals for violations of the restrictive covenants in any of the bargaining units?"

Circuit's affirmance of the district court's finding that UMW "could not be required, as a means of escaping antitrust liability, to bargain for labor standards, wages or working conditions that would improve the plaintiffs' competitive position by the reduction of wages or labor standards, by gearing wages to the status of mechanization or its lack, or by tying wages to productivity" (265 F.Supp. 431). Futhermore, good faith bargaining is a matter within the exclusive jurisdiction of the National Labor Relations Board. The Sixth Circuit itself in *first Pennington* declared offenses within that jurisdiction have no relevance to antitrust cases, where *"a combination or conspiracy . . . must be shown"* (325 F.2d 810). This Court's recent *H. K. Porter Co., Inc.* v. *NLRB*, decided March 2, 1970, 73 LRRM 2561, recognized that *Taft-Hartley's* Section 8(d), requiring good faith bargaining, assures freedom of contract and precludes the compulsion of substantive terms of collective bargaining agreements (pp. 2563-64). Petitioners, of course, were not required under *Taft-Hartley* to execute UMW's National Agreement, as admittedly employers representing 18% of the coal industry's employees chose not to do (Pet. 20). Petitioners obviously desire to have the respectability of producing coal under a labor contract, but are totally unwilling to assume its burdens.

Petitioners' citations (Pet. 27) of *Associated Press* v. *United States*, 326 U.S. 1; *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457; and *Anderson* v. *Ship Owners Association*, 272 U.S. 359, 363-65, which they attribute to Justice White, are inapposite and isolated from his statement, preceding the citations, which relate to an achieved *anticompetitive agreement*, which is at total variance from the instant case (381

U.S. 668). This exemplifies petitioners persistent unwillingness to recognize labor's exemption from the antitrust laws.

c. The Sixth Circuit's affirming opinion and the district court properly rejected petitioners' contentions that UMW violated *Sherman*.

Evidentiary support of the district court's exoneration of UMW of the conspiracy prior to the 1958 Agreement appears *ante*, pp. 6-8. Similarly, the affirming opinion's validity as to PWC appears *ante*, pp. 12-13. The Sixth Circuit's affirming opinion (*ante*, pp. 13-16) rejected evidence of events in southeastern Tennessee coal fields and pricing of coal upon the TVA market as evincing a *Sherman* conspiracy. It noted, "There is ample evidence in this record to support" district court findings and "we certainly cannot hold them to be 'clearly erroneous' ", citing Rule 52(a), Federal Rules. As in UMW's discussion of PWC (*ante*, p. 31), the instant certiorari petition does not challenge the affirming opinion's statement.

On the other hand, the certiorari petition (pp. 24-25) notes Judge O'Sullivan's opinion connecting TVA market competition and union investments in West Kentucky Coal Company with the alleged conspiracy, saying "Top people" of UMW and BCOA "did not need" *Norris-LaGuardia's* protection in negotiating and signing the 1958 Agreement, or in UMW's making large investments "to aid the big coal companies to fulfill the promise of the plan". These statements are fallacious and ignore the undisputed fact that West Kentucky Coal Company was never a BCOA member (919-23a), that UMW indisputably made no suggestions and proposed no policies with reference to West Kentucky's and/or Nashville Coal's

management or pricing policies (*ante*, p. 14, fn. 10) and that proof of conspiracy still remains the essential ingredient of a *Sherman* violation (*ante*, pp. 26-27), the answer to which must be found in evidence adduced and not "in some crystal ball or vaguely sensed by some process of intuition, based upon chance phrase used here or there." *U.S.* v. *Morgan*, DC, S.D. N.Y., 1953, 118 F. Supp. 621, 634.

5. Petitioners Seek This Court's Review Of Evidence Which Both The District Court And The Sixth Circuit's Affirming Opinion Have Held Did Not Support The Charge That UMW Conspired In Violation Of The Sherman Act.

The two sets of appendices filed as part of the certified record herein cover 2,529 pages. As already noted (*ante*, p. 31), this Court recognizes that a conclusion based on inferences drawn from documents or undisputed facts in antitrust cases must be affirmed unless clearly erroneous. Since each of the findings had the concurrence of the Sixth Circuit's affirming opinion and the district court, this Court should reject the invitation to review the instant case, implementing its rule that "We do not grant a certiorari to review evidence and discuss specific facts". *U.S.* v. *Johnston*, 268 U.S. 200, 227.

CONCLUSION

For the reasons herein discussed, UMW submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March, 1970

APPENDICES

APPENDIX A

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction

thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, July 7, 1955, c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * *

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

* * *

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust

laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52. STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any

such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

* * *

29. USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102. PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to

associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

* * *

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104. ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute,

any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

* * *

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106. RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or

liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

* * *

29 USCA Sec. 141 (Sec. 1, Labor Management Relations Act, 1947):

§ 141. SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to

the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, c. 120, § 1, 61 Stat. 136.

* * *

29 USCA Sec. 151 (Sec. 1, National Labor Relations Act, as Amended):

§ 151. FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

* * *

29 USCA Sec. 157 (Sec. 7, National Labor Relations Act, as Amended):

§ 157. RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

* * *

29 USCA 158(e) [Sec. 8(e), National Labor Relations Act, as Amended]:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void.

* * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat., 140; Oct. 22, 1951, c. 534.

§ 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

Rule 52(a), Federal Rules of Civil Procedure:

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX B

Excerpts from

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959

(Government Printing Office, 1959), Volume II:

Representative Rhodes of Pennsylvania:

pp. 1641-42:

. . .

"No longer was there regard for the economic problems of individual business firms or the impact of demands upon any local industry or area affected."

. . .

"No longer was wage bargaining a matter for elected local union leadership. Now, professional labor leaders at the national or international level did the dickering, setting wage patterns for whole industries . . ."

. . .

"Chief victims of labor monopoly power remain the consumer and the small businessman."

. . .

Representative Alger of Texas:

p. 1508:

. . .

"The consequent denial to unions of the right to fix prices . . . would not in any way interfere . . . with their proper collective bargaining powers. They would merely be placed on an equal footing with all other groups in society as was the case during the fifty years prior to the Hutcheson decision."

. . .

p. 1690:

"The unions should be put under the antitrust laws so that business and labor will both operate under the same ground rules."

. . .

"Monopolistic practice of industrywide and pattern bargaining by professional labor bosses at the national or international level would be ended."

. . .

Representative Hoffman of Michigan:

p. 1717:

. . .

"When we were writing the Taft-Hartley law, . . . we had in it a provision designed to prevent nationwide, industry-wide bargaining."

. . .

"There would appear to be no sound reason why those provisions making anti-monopoly laws applicable legislation to unions should not now be in this bill."

. . .

Representative Heistand of California:

p. 1748:

. . .

"Prevent centralized control of collective bargaining policies by national or international unions, and return these functions to the local union level."

. . .

". . . big power combinations of unions would be broken up, just as the big corporation trusts of the 1890's were broken up by the Sherman Act."

. . .

Representative Flynn of Wisconsin:

p. 1837:

. . .

". . . As we get big unionism to match big business, we will indeed have a new type of economy . . . is this for the best interests of America and the people of America?"

. . .

Senator Morse of Oregon:

p. 1190:

. . .

"Labor law in America reflects increasing awareness that no sound economic theory permits free market thinking to be applied to wages and working conditions, as it is to prices. In the absence of collective bargaining the wage market is a fiction for wages and working conditions are established unilaterally by the employer. Competition among workers against each other for jobs produces not fair wages, but sweatshops; not increased productivity, but depressions. Society should not, under the guise of preserving freedom to compete, force them to bear the competitive burden which an entrepreneur in hope of profit, voluntarily assumes. In modern industrial society, meaningful economic freedom for the vast majority of employees can be attained not through individual, but from collective action.

"This was the reasoning behind Congress' declaration in 1914 in the Clayton Act that 'the labor of a human being is not a commodity or article of commerce' and that labor unions shall not 'be held or construed to be illegal combinations in restraint of trade under the antitrust laws.' That declaration reflected recognition that 'to render a labor combination effective it must eliminate

the competition from nonunion made goods,' and that elimination of price competition based on differences in labor standards is the objective of any national labor organization. Once the purpose of employee combination was thus recognized, sanction of the conventional tactics of organized labor in its effort to improve its material conditions followed inevitably. These tactics, peaceful primary picketing are the only civilized means through which organized workers can safeguard their own wages and working conditions against the competition of unorganized workers; the only way—short of governmental wage fixing—through which price competition based on differences in labor costs can be eliminated. To deprive organized workers of these means of competing with unorganized workers dooms their objective to defeat.

"Once we recognize that establishment of uniform wages and hours through collective bargaining as desirable, common sense should accept peaceful tactics by which unions traditionally seek in their own self-interest, to enlist nonmembers. Those who choose to work as nonunionists, by that very choice, tend to defeat and undermine the economic interests of union members in maintaining good wages and working conditions for themselves. In defense of their own economic position and in the fact of varying shades of employer hostility, union members should accordingly be free to utilize such economic power as they possess to persuade employees of the value of their cause."

. . .

Representative Oliver of Maine:

p. 1809:

. . .

"As I see the picture, Mr. Speaker, the adoption of this Landrum-Griffin conference report leads in only one direction. It is just one more step toward more restrictive labor legislation. The U.S. Chamber of Commerce, the National Manufacturers Association, speaking and acting for big business with their appetites for further labor control whetted by this victory, will press for the ultimate victory; namely, a national so-called right-to-work law and then, the antitrust stranglehold for which they are really aiming. Many of them have already so stated. The program of big business in America is not only to control financially and economically, but also politically . . ."

. . .

"The Landrum-Griffin conference report will not only slow down further the growth and strength of the trade-union movement, but it will eventually lead to the more repressive developments to which I have referred; namely, the so-called right-to-work laws on a national scale and then, the crowning blow, the antitrust knock-out punch. This will mean the breakdown of American democracy.

"As long as I am a Member of this House, Mr. Speaker, my vote will never be recorded for legislation which makes illegal the economic weapons which the working men and women need, to fight for and get their fair share of the production of this great productive plant which is known as industrial America.

"Mr. Speaker, I am opposed to and shall vote against this Landrum-Griffin conference report."

. . .